

Nos. 11,781, 11,782, 11,783, 11,784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

vs.

UNITED STATES OF AMERICA,

Appellant,

No. 11,781

No. 11,782

Appellee.

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

vs.

UNITED STATES OF AMERICA,

Appellant,

No. 11,783

No. 11,784

Appellee.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

APPELLEE MISCONSTRUES THE SILK AND GREYVAN CASES.

Like the Appellants, Appellee is basing its argument largely on the *Silk* and *Greyvan* cases. Unlike Appellants, however, it fails to consider the opinion in its entirety, uses only isolated dicta, and completely ignores what was actually decided, namely, that the truckers were independent contractors.

Typifying Appellee's misuse of dicta, is its adoption and application of the term "economic reality" as a criteria of great importance to be applied in all situations. It would be difficult to think of any expression more vague or requiring more care in its application and use for determining whether a person is an employee or an independent contractor. Whenever one engages in any activity, independent or otherwise, for his material advancement, the element of economic reality necessarily is present. The truckers in the *Greyvan* case were dependent on the Greyvan Company. They had no other business. They had no good will separate from the good will of the Greyvan Company, the name of which was painted on their trucks. Accordingly, the term "economic reality," as Appellee uses it, turns out to be little more than a catchy expression by which the social security administrators, notwithstanding the evident limitations of the law, seek to extend social security benefits—and burdens—to all who they think, as a matter of "economic reality," should have them. Obviously, such a philosophy has no bounds.

Appellee also places great reliance upon the *Hearst* case. The status of the vendors in that case was carefully considered by this Circuit Court and held by it to be that of independent contractors—a holding which this court observed was supported by the authorities (*Hearst Publications Inc. v. N.L.R.B.* (C.C.A. 9th Cir.), 136 F. (2d) 608). There was a dissenting opinion, but it was stated therein: "If I were free to draw my own inferences from the tes-

timony, I would decide that they were independent contractors, engaged in their own businesses on their respective spots." Thus, the reasoning of the dissent was that the court was bound by the Labor Board's finding. "The same reasoning explains the United States Supreme Court's reversal of this court in that case.

The Supreme Court, in its opinion in the *Hearst* case, says: "The record sustains the Board's findings and there is ample basis in the law for its conclusions." A cursory reading of this language might give the impression that the court concurred in the Board's findings. Apparently, the District Court drew this inference. A more careful analysis will show, however, that this is not so. The court went no further than to hold that the record sustained the Board's findings, meaning only there was some evidence in support thereof, and that, accepting these findings, there was ample basis in law for the Board's conclusion. Furthermore, it reasoned that it must give deference to the opinion of the Board in determining who were to be considered employees. The limited right of the courts to review the Labor Board's findings, as here illustrated, resulted in so many legally unassailable but ill-advised Board decisions that Congress, by the Taft-Hartley Law, amended the review provisions. The conference report makes it clear that the Supreme Court's decision in the *Hearst* case was one of the prompting causes of this amendment. It reads in part as follows:

“Under the language of section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive ‘if supported by evidence.’ By reason of this language, the courts have, as one has put it, in effect, ‘abdicated’ to the Board (citing cases). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111) * * *”

1 C.C.H. Lab. Law Rep., Par. 8350.05).

Congress also believed that the Labor Board exceeded the proper limitations of the National Labor Relations Act in holding independent contractors to be employees thereunder. To prevent any repetition thereof, it also included in the Taft-Hartley Act a provision expressly excluding independent contractors from the definition of employees. Because of this amendment, the Board itself has since changed its position and held route carriers to be independent contractors. In so doing, it stated:

“Although we are persuaded that the facts in this proceeding are more nearly opposite to those in the *Philadelphia Record* case, we find it unnecessary, in view of the amended Act, to place any reliance on the reasoning in that case. The amended Act, as already noted, specifically excludes ‘independent contractors’ from the category of ‘employees.’ The legislative history, in this connection, shows that Congress intended

that the Board recognize as 'employees' those who 'work for wages or salaries under direct supervision,' and as 'independent contractors,' those who 'undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profit.'

"The aforesaid criteria, when applied to this case, clearly establish that these particular carriers are independent contractors."

(*In the Matter of The Kansas City Star Company, etc.*, 76 N.L.R.B. Case No. 17-R-1701, Feb. 26, 1948; Abstract of decision, 1 C.C.H. Lab. Law Rep., Par. 6369.)

From the foregoing, it appears that this Circuit Court's reasoning and decision in the *Hearst* case has been vindicated.

While it is not known what the Supreme Court would have done in the *Hearst* case had it been free to review the evidence, it is known what it did soon thereafter in the *Silk* and *Greyvan* cases. It held the truckers to be independent contractors, notwithstanding references made in its opinion to the *Hearst* case, and notwithstanding the dicta contained in its opinion to which Appellee seeks to attach so much importance. It would seem to follow from this that the meaning and significance which Appellee attributes to these references and dicta are without foundation and are in direct conflict with the Supreme Court's decisions.

In support of the inferences which it has drawn from the above mentioned Supreme Court decisions, Appellee cites the case of *Henry Broderick, Inc. v. Squire* (C.C.A. 9th Cir.), 163 F. (2d) 980. Appellee's reliance on this case is difficult to understand since it contains an interpretation of the *Silk* and *Greyvan* cases fully supporting that of Appellants. Among other things, it restates the proposition that Congress showed no intention to disturb normal business relationships, and, relying on the *Silk* and *Greyvan* cases, held the brokers there involved to be independent contractors. See also *Emard v. Squire* (D. Ct. Wash. 1945), 58 F. Supp. 281, where the Court held fishermen independent contractors under the Social Security Act notwithstanding the Supreme Court's decision in the *Hearst* case. Attention is particularly directed to that portion of the opinion on page 285 dealing with the *Hearst* case.

II.

AUTHORITIES CITED BY APPELLEE.

Among the mass of authorities cited by Appellee, there is no decision passing upon the status of vendors under the Social Security Act. The fact that the Act has been in effect since 1935, and that no cases have arisen thereunder concerning vendors, indicates that prior to the case here under appeal, vendors were considered by the social security administrators themselves to be independent contractors. It is also worthy of note that there are no decisions involving the status

of vendors under the federal income tax law requiring withholding from employees' wages.

Appellee, on page 22 of its brief, cites a number of cases which it states hold vendors to be employees. Actually, only one of the cases there cited concerns a street news vendor, and its facts differ so widely from those of the instant case that it is not in point. The case referred to is *Pacific Em. Ins. Co. v. Ind. Acc. Comm.*, 3 Cal. (2d) 759; 47 P. (2d) 270. There, the vendor's duties were to sell a publisher's newspaper exclusively and check in other vendors. For such service, if performed to the satisfaction of the district manager, he received 21½¢ a paper plus 50¢ bonus a day. Because of this special arrangement, in substance that of a supervised commission salesman, the ordinary rule in respect of vendors obtaining in California was not applicable.

While each case must be decided on its own facts, the conclusion reached in most cases involving street news vendors was that the vendors were independent contractors.¹ In fact, the prevailing rule relative to vendors was so well known that the vendors were advised by their union superiors and counsellors in 1937, when the first union contract with the publishers was

¹*New York Indemnity Co. v. Ind. Acc. Comm.*, 213 Cal. 43; 1 P. (2d) 12; *Assoc. Indemnity Co. v. Ind. Acc. Comm.*, 115 Cal. App. 754, 2 P. (2d) 51; *Hartford Acc. Indemnity Co. v. Ind. Acc. Comm.*, 123 Cal. App. 151, 10 P. (2d) 1035; *Balinski v. Press Publishing Co.*, 118 Pa. Sup. 89, 179 Atl. 897; *Bernat v. Star Chronicle Pub. Co.* (St. Louis Ct. App. 1935), 84 S.W. (2d) 429; *Creswell v. Charlotte News Pub. Co.*, 204 N.C. 380, 168 S.E. 408; *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162, 149 So. 74.

entered into, that the vendors were independent contractors. (R. 320-322).

The other cases cited by Appellee, purporting to cover vendors, actually cover what are known in the newspaper world as route carriers. Since these are persons who deliver newspapers to regular subscribers of the publishers, as distinguished from vendors who buy newspapers and sell them on the streets to the public, different considerations are presented, and the cases are of little assistance in determining a vendor case. The distinction between the route carrier and the vendor is succinctly made in one of the cases which Appellee has cited, namely, the *Matter of Scotola*, 282 N.Y. 689, 26 N.E. (2d) 815. There, the decision appealed from contained the following statement:

“The relation between this carrier and publisher differs from that of a newsboy who purchases papers and sells them on the street corner through crying his wares. While this carrier paid the appellant’s inspector for the papers which he delivered, his ownership was qualified, as they could be used only in fulfilling the publisher’s contract with its subscribers and in furthering the effort of the publisher to obtain new subscribers.”

Although Appellee cites a route carrier case from Georgia, a similar distinction is made in an opinion of the General Counsel of that state, as follows:

“It is universally held that a street news boy selling daily papers on the streets of a big city is

not an employee. It is the custom of such boys to purchase from the publisher a stipulated number of papers at a price less than the sale price on the streets. He makes a profit on the sale of the newspapers purchased by him from the purchaser (sic, publisher) but is under no obligations or direction on the part of the publisher and is, therefore, deemed to be an independent contractor.

“News boys who deliver papers to homes are, however, employees of the publisher. These carriers do not purchase papers from the publisher. They usually work on commission. They are required by the publisher to deliver papers at a certain time and on a certain route to certain homes designated by the publisher within certain limitations as to time and upon a schedule of prices fixed by the publisher. These delivery boys are under the actual control of the publisher and are, therefore, not deemed to be independent contractors. (Digest U.C.B. Gen. Counsel op. 3-1-38.)”

(3 P.H. Soc. Sec. Ser., Georgia, Par. 27226.40.)

Further, the Utah, Washington, and Oregon cases all involved an Unemployment Compensation Act which, unlike the Federal Act, contains a broad definition of employee and creates a statutory presumption that persons rendering services are employees unless the taxpayer can prove otherwise by establishing certain specified requirements to the satisfaction of the administrative agency. Because of the interpretation given to the broad statutory definition of employees

by the cases Appellee relies upon, Oregon and Utah each passed a law exempting route carriers. (5 P.H. Soc. Sec. Ser. (Oregon), Par. 27226.40, 6 P.H. Soc. Sec. Ser. (Utah), Par. 27226.13. A Washington decision subsequent to the one relied upon by Appellee held route carriers to be independent contractors. The situation was thereafter clarified in that state by enactment of a similar specific exemption (6 P.H. Soc. Sec. Ser. (Washington), Par. 27226.40). Even though a distinction may be made between vendors and route carriers, in most instances the court has concluded that route carriers are independent contractors.²

No useful purpose can be served by considering the many other cases cited by Appellee involving various types of salesmen and entirely dissimilar fact situations.

III.

APPELLEE'S TREATMENT OF MATERIAL FACTORS.

At pages 17-30 of Appellants' opening brief, it was developed that the District Court erred by relying on facts unsupported by the record and, in some instances, contrary to its own findings, and also by attaching undue significance to certain facts while dis-

²*Ross v. Post Pub. Co.*, 129 Conn. 564, 29 A. (2d) 768; *Gall v. Detroit Journal Co.*, 191 Mich. 405, 158 N.W. 36; *State Compensation Ins. Fund v. Ind. Acc. Comm.*, 216 Cal. 351, 14 P. (2d) 306; *Bohanon v. James McClatchy Pub. Co.*, 16 C.A. (2d) 188, 60 P. (2d) 510; *Rathbun v. Payne*, 21 C.A. (2d) 49, 68 P. (2d) 291.

missing other important ones as mere details. Appellee's answer to Appellants' attack on these unsupported findings consists chiefly of no more than a reference to the findings themselves, and its answer to Appellants' attack on the lower court's reasoning is limited to a mere repetition of such reasoning.

Control Factor.

Appellants attacked the inference drawn by the District Court that control was exercised by the publisher through selecting vendors, fixing or shifting their places of work, and discontinuing sales to the vendor. Appellants pointed out that a publisher did not contract with a vendor in respect to a corner thereafter to be designated by the publisher, but with respect to a then specified corner; that once the contract was made the publisher *could not* transfer the vendor or discontinue sales to him except for cause; and that the District Court expressly had so found (R. 27, Appellants' brief 22). The court's correct finding in this respect undoubtedly was based on the broad arbitration clause in the contract (Appellants' brief, Appendix III, sec. 36), and the testimony of the only witnesses in this respect (R. 190-3, R. 344). It was also pointed out in Appellants' brief that, while the publisher could discontinue a corner, by so doing it lost its retail outlet at that corner, a consequence which operated to prevent any abuse of the right; and, further, that such right to discontinue sales was typical of the buyer-seller relationship. Appellee deals with Appellants' contentions on pages 27,

28, and 41 of its brief. After repeating on page 27 its inferences and reasoning, Appellee contends on page 41 that the right to discontinue sales is tantamount to the right to terminate. On page 28, it says:

“Lastly, it must be recognized *realistically* that in the publisher’s right to terminate the relationship *for cause* or their right to designate locations and transfer a vendor from one location to another, [a transfer also could be made only for cause, as the court found] there was implicit considerable power of control.” (Emphasis added.)

Such reasoning has no support in the law. See Judge Hand’s opinion cited in this connection on page 23 of Appellants’ opening brief, also this court’s opinion in the *Hearst* case.

Appellants’ contention that the court erred in finding that the publishers fixed the vendors’ profits is actually supported by the assertion (page 27, Appellee’s brief) that the contract between the parties fixed the wholesale and retail price of the papers. This is the fact. The price between every buyer and seller is a matter of contract.

Appellee then adds (page 27 of its brief) that the publisher controlled the number of newspapers delivered to a vendor. In support thereof, only the court’s finding (R. 69) is cited. However, the court’s finding, while ambiguous, is not to this effect. It is that the number of newspapers delivered at a corner was the number estimated to be needed; that any disagreement as to the number was a matter for settlement be-

tween the publisher and the Union. Moreover, Appellants contend that the testimony on this point establishes the statement made in Appellants' brief (page 4) that the vendors were entitled to receive, and did receive, the number they specified (R. 182), the only qualification being the fact that the number of the first edition delivered was what was shown by experience to be needed.

Appellee urges as another element of alleged control (pages 28 and 43 of its brief) that the vendors were required to return unsold newspapers and, hence, that title thereto did not pass to the vendors.

Appellee's argument in this respect is based on a misleading quotation of the contract. Appellee quotes (page 44) as a complete sentence the first part set forth below but leaves out the balance of the sentence, namely, the part set forth in italics:

"All unsold complete newspapers shall be returned to the Publisher's representative in accordance with the requirements of the Publisher, *and if so returned by the News Vendor to whom they were sold by the Publisher, shall be credited to such News Vendor at the wholesale price, such credit to be given at the settlement of each day's sales.*" (Appellants' Opening Brief, Appendix III, sec. 19.)

The same section then sets forth an interpretive clause covering the quoted provision and provides in substance that the vendor is entitled to have credit if he returns unsold papers under certain conditions.

Thus, it is evident that the vendor is given a qualified right to return unsold papers, and that the only mandate of the word "shall" is that if he wishes to receive credit he must return the papers in accordance with the requirements of the publisher and not when and as he himself may choose.

After enumerating other so-called control elements, the irrelevancy of which was pointed out in the Appellants' opening brief, Appellee, after conceding (page 30 of its brief) that it may be true that the vendors were free from detailed control, asserts that excerpts from certain corner complaints showed who was boss. The excerpts show that a wholesaler on occasion checked a man in, i.e., collected from him, and refused further deliveries because he was drunk. This indicates only that the wholesaler was doing what any prudent person charged with the duty of delivering papers to vendors and collecting therefor should have done. When the wholesalers asked the publishers to take action for cause, they were prompted by failure of one kind or another on the part of the vendor properly to fulfill his contract. The very fact that the wholesalers went to the publishers with these complaints demonstrates that they had no disciplinary power. Whenever a wholesaler attempted to discipline a vendor, or otherwise exert control over him, he did so in violation of his instructions and in excess of his authority (R. 344). The witness Parrish clearly described this situation in somewhat informal, but, nevertheless unambiguous, language (R. 191). Isolated instances of such conduct do not change the true

nature of the status of the vendors. Moreover, Appellee does not contend, nor does the record show, that any action was ever taken by the publishers on any of these complaints. It does show, however, that a wholesaler was discharged for attempting to exercise control (R. 191).

Argument of Appellee to the effect that control was unnecessary and, hence, the lack of it not material, that supervision, sales meetings, and vendor reports were unnecessary and, hence, irrelevant considerations, and that there is only one way physically to sell a newspaper, only serves to demonstrate the lack of understanding which Appellee has of the small but independent merchant. Appellants submit that where a man contracts for a street location for the sale of papers, determines by contract the price he pays therefor, is free to sell the papers he buys, together with any other commodities which he may choose to sell, all free from supervision and in his own way, accounting to no one except for the cost of his merchandise, dependent entirely on his own initiative as to the variety and quantity of articles he sells and the profit he thereby makes for himself—he is an independent contractor of a type long and well established—a street merchant.

Other Relevant Factors.

What has just been said—and developed at length in Appellants' opening brief—makes an extended reply to Appellee's treatment of the other factors unnecessary. Appellants repeat that small merchants

who desire to act as such and to maintain their independence are no less operating on their own account because their investment is comparatively small and their risks (except as to their own time) not great. Theirs is not a business requiring great skill or large capital investment, but it is a business depending in part on good will and requiring initiative. That the degree of initiative displayed ranges from those who sell one paper to those who sell two or more and, finally, to those who maintain large news stands where many articles are sold is typical of all forms of independent business endeavor.

The fact that a certain minimum of earnings was guaranteed is of no relevance, and the District Court very properly attached no significance to it. As explained on page 5 of Appellants' opening brief, the publishers, in developing new territories, sometimes found it necessary to guarantee that the vendors would at least earn a minimum amount each week (R. 135). The minimums were low and designed to take care of such situations. While the guarantee is contained in the Union contract and, hence, in terms, is applicable to all, the number of vendors whose earnings did not exceed the guarantee varied from as low as 8% to 30%, depending on the newspaper and the period of time in question (R. 349, 446, 467, and 468). Such guarantees are commonly given to various types of independent distributors or operators, particularly in developing new territory. Appellee makes a reference to bonuses (also in the nature of guarantees),

but no bonuses were paid or provided for during the period in question.

Appellee urges that the fact that the vendors formed a Union which was affiliated with the American Federation of Labor is an indication that they were employees. Appellants submit that it is not. The truckers held to be independent contractors in the *Greyvan* case were members of a union, and worked under a contract between the company and the union. The same was true of salmon fishermen who were held to be independent contractors. (*Emard v. Squire*, supra.) It is not uncommon for independent operators to combine to increase their bargaining power. A conspicuous example is the farmers' association or co-op.

It is, nevertheless, material that the vendors were represented by a powerful Union, and that under its advice and guidance a contract creating the buyer-seller relationship was entered into. Whatever motive the Union may have had in so doing, its presence in this proceedings throughout should leave no doubt that the Union here concerned believes that the interests of its members will best be served by maintaining the independent relationship. If it is the vendors' desire to remain independent, as it is, and the desire of the publishers that the vendors shall remain independent, as it is, their common desire should be respected. The contract of the parties in this case is no subterfuge as was the one the social security admin-

istrator tried to uphold in the *Bartels* case. The fact that the Union was a party to the contract makes it evident that the parties were dealing at arm's length.

IV.

CONGRESSIONAL INTENT.

In their opening brief, Appellants pointed out, by reference to the history of social security legislation and by analogy of reasoning from Congressional action taken as a result of the Labor Board's ruling in the *Hearst* case, that Congress never intended the word "employee," as used in the social security laws, to be construed other than in its ordinary sense, and hence, that Congress never intended that the social security laws should be applied to vendors who buy newspapers and sell them at retail.

Since the filing of that brief, Congress has acted again. By an overwhelming vote (See vote tabulation at bottom of Appendix I), it passed, over the President's veto, H. R. 5052, an amendment specifically exempting services performed by an individual who sells newspapers "to ultimate consumers, under an arrangement under which the newspapers * * * are to be sold by him at a fixed price his compensation being based on the retention of the excess of such price over the amount at which the newspapers * * * are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service,

or is entitled to be credited with the unsold newspapers * * * turned back." (Appendix I.)

This amendment was enacted because of the District Court's decision here on appeal, and for the purpose of clarifying the employer-employee status of newspaper vendors for social security purposes. (See Report of Committee on Ways and Means, Appendix II.)

The enactment of this amendment is conclusive proof of what has always been apparent, except to those seeking by administrative fiat to enlarge the scope of social security, namely, that vendors buying newspapers and retailing them to the public were never intended by Congress to be classified as employees under social security. Accordingly, the assessment of social security taxes with respect to the vendors here involved, and the approval of that assessment by the District Court in this case, violated Congressional intent; and was an unauthorized administrative and judicial trespass upon legislative prerogative.

It is established that this court may consider the amendment made to the social security laws by H. R. 5052 for the purpose of discovering the intention behind, and, hence, the meaning of, the social security laws as originally enacted. (*Domarek v. Bates Motor Transport Lines* (C.C.A. 7th Cir.) 93 F. (2d) 522; *Luckenbach Steamship Company v. United States*, 280 U.S. 173, 74 L. Ed. 356.)

CONCLUSION.

Appellants desire to make it clear that their position in this case is not to be understood as being opposed in principle to the extension of social security benefits to whatever extent may be deemed advisable. However, they are strongly opposed to any extension except by orderly and well considered legislative action embodying adequate provision for administrative procedure if the self-employed are to be included. In no other way can the confusion which would otherwise result be avoided, and in no other way can the checks and balances, fundamental to the American form of government, be preserved.

Dated, San Francisco, California,
April 28, 1948.

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(Appendices I and II Follow.)

Appendices.



Appendix I

80th CONGRESS
2d Session

H. R. 5052

IN THE HOUSE OF REPRESENTATIVES

A BILL

To exclude certain vendors of newspapers or magazines from certain provisions of the Social Security Act and Internal Revenue Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 209 (b) (15) of the Social Security Act, as amended (U.S.C., 1940 edition, Supp. V, title 42, sec. 409 (b) (15)), and section 1426 (b) (15) of the Internal Revenue Code, as amended, are hereby amended to read as follows:

“(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

“(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price his compensation being based on the retention of the excess of such price over the amount at which the

newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back; or”.

(b) The amendment made by subsection (a) to section 209 (b) (15) of the Social Security Act shall be applicable with respect to services performed after the date of the enactment of this Act, and the amendment made to section 1426 (b) (15) of the Internal Revenue Code shall be applicable with respect to services performed after December 31, 1939.

SEC. 2. (a) Section 1607 (c) (15) of the Internal Revenue Code, as amended, is hereby amended to read as follows:

“(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

“(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;”.

(b) The amendment made by subsection (a) shall be applicable with respect to services performed after December 31, 1939, and, as to services performed before July 1, 1946, shall be applied as if such amendment had been a part of section 1607 (c) (15) of the Internal Revenue Code as added to such code by section 614 of the Social Security Act Amendments of 1939.

SEC. 3. If any amount paid prior to the date of the enactment of this Act constitutes an overpayment of tax solely by reason of an amendment made by this Act, no refund or credit shall be made or allowed with respect to the amount of such overpayment.

March 5, 1948—Passed House of Representatives (unanimous).

March 24, 1948—Passed Senate (unanimous).

April 5, 1948—Vetoed by President Truman.

April 14, 1948—Veto overridden by House—307 to 28.

April 20, 1948—Veto overridden by Senate—77 to 7.

Appendix II

80th Congress) HOUSE OF REPRESENTATIVES (Report
2d Session) (No. 1320)

CLARIFYING EMPLOYER-EMPLOYEE STATUS OF CERTAIN
NEWSPAPER AND MAGAZINE VENDORS FOR
SOCIAL-SECURITY PURPOSES.

February 3, 1948.—Committed to the Committee of
the Whole House on the State of the Union
and ordered to be printed.

Mr. Gearhart, from the Committee on Ways and
Means, submitted the following

REPORT

(To accompany H. R. 5052)

The Committee on Ways and Means, to whom was referred the bill (H. B. 5052) to exclude certain vendors of newspapers or magazines from certain provisions of the Social Security Act and Internal Revenue Code, having considered the same, report favorably thereon and recommend that the bill do pass.

General Statement.

This bill seeks to clarify the coverage provisions of title II of the Social Security Act, as amended, and related taxing provisions found in the Internal Revenue Code as these requirements apply to the vendors of newspapers and magazines.

Whatever effect it may have on the extension or restriction of existing coverage provisions is purely incidental to its main purpose, which is the removal of a substantial area of ambiguity and confusion in the application of the coverage provisions of the act. The bill has the unqualified endorsement of the newspaper publishers, the vendors concerned, and their union representatives. A telegram recently received from an important news-vendors' union is attached to this report.

Under existing law, service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, is specifically excluded from the type of employment covered by title II of the act. All other services for newspaper- or magazine-publishing firms, including that of delivery or distribution by individuals over the age of 18, were to be treated as giving rise to an employer-employee relationship or independent contractor relationship depending on the usual common-law tests.

One of the most difficult problems in the administration of these provisions of the law is the determination of who is and who is not an employee engaged in the sale or distribution of newspapers if the individuals concerned are over the age of 18. Coverage depends upon whether there is employment, but neither the term "employment" nor the terms "employer" and "employee" are precisely defined in the law.

Regardless of whether news vendors are or are not technically employees, under some decisions in recent cases, including a decision by one of the Federal district courts in California, involving certain vendors of newspapers, it has been held that the common-law tests, while thoroughly valid, are inadequate. The Government now contends that any type of service relationships constitutes employment for coverage purposes if it is not incidental to the pursuit of an independent calling, such as professional services rendered by lawyers, doctors, engineers, accountants, and the like. Obviously this raises the question of what is meant by "an independent calling."

The bill in question is not offered as the complete answer to the troublesome problem of defining employment or determining the existence of an employer-employee relationship. It simply provides that in the sale or distribution of newspapers and magazines under a contractual arrangement whereby sales are made at a fixed price, and compensation in whole or in part is measured by the excess of such price over the amount at which the newspapers or magazines are charged to the vendor, such vendor shall not be covered under title II of the Social Security Act regardless of whether he is guaranteed a minimum amount of compensation or credited with newspapers or magazines returned to his supplier.

The retail sales of newspapers and magazines, especially in our larger cities, is accomplished under unique and widely varying circumstances. A great many vendors, over the age of 18, commonly pur-

chase their papers with their own capital and become virtually free agents to dispose of them at will, retaining what they consider to be profits and not wages.

Your committee feels that an important factor in determining that newspaper and magazine vendors should be treated as independent contractors or persons otherwise pursuing an independent calling, is the fact that they deal as independent principles with their own customers and that their success depends in large measure upon the good will engendered by them among such patrons. This fact has been too frequently overlooked in recent years in ascertaining the status of many classes of working people as employees in the types of activities covered by the Social Security Act. In the case of vendors of published periodicals or other reading matter, the mere fact that the contractual right to return unsold goods at a given time exists (and this is a familiar practice among manufacturers and merchants as well) has little if any bearing on the ascertainment of the question of employment status.

Your committee is impressed with the fact that the vendors of newspapers and magazines are ordinarily free to sell other goods, wares, and merchandise, and frequently do; that they determine the way and the manner of offering the papers and magazines for sale; that they assume the risk of loss or destruction of papers or magazines which they are prevented from returning for credit; and that

their gains should be considered as profits from their own business rather than as wages for employment.

After hearing considerable testimony in a public hearing your committee believes that where the basic method of compensation is that described above, these vendors should not be treated as employees; that to consider them as employees of the publishing firms whose products they buy and sell produces a ridiculous and absurd rule with implications that could be construed so as to permit any person over the age of 18 selling the products of another, under like arrangements, to be considered the employee of the one supplying such articles or products. Such a rule would create an unconscionable administrative burden upon the Government and upon the business firms and individuals concerned.

Among other things, it would require every publishing house to withhold the required tax from the profits of every individual selling the product of that firm. News, information, and reading matter written for profit and offered for sale to any buyer, or distributed gratis, is, in the judgment of your committee, a commodity within certain obvious limitations. One who buys it and sells or distributes it for a profit even though conditions may be attached to the selling or distributing process, clearly should not be regarded as standing in an employer-employee relationship.

The requirement of the bill, that the services will not be excluded unless performed "at the time of" the sale to the ultimate consumer, was inserted to

make it clear that the exclusion was not to apply to a regional distributor whose services are antecedent to but not immediately part of the sale to the ultimate consumer. The insertion of the quoted words will not deny the exclusion although the vendor performs incidental services as a part of the sale, such as services in assembling newspapers and in taking them to the place of sale.

In order to avoid wiping out benefits and benefit rights which have already accrued and on which individuals may have placed reliance, the amendment to section 209 (b) (15) of the Social Security Act, relating to benefits under the old-age and survivors insurance system, is made effective with respect only to services performed after the enactment of the bill.

The amendments to the old-age and survivors insurance and unemployment taxing provisions in the Internal Revenue Code are applicable with respect to services performed after December 31, 1939. In the case of the unemployment tax, the bill provides that, as to services performed before July 1, 1946, the amendment shall operate in the same manner and have the same effect as if such amendment had been a part of section 1607 (c) (15) of the code as added to the code by section 614 of the Social Security Act amendments of 1939.

The bill prohibits any credit or refund of any amount paid prior to the date of enactment of this bill which constitutes an overpayment of tax solely by reason of an amendment made by this bill.

Your committee does not feel enactment of this legislation would in any way impair, hinder, or restrict the development or improvement of the present social-security system. On the contrary, by making it more exact in its terms and more easily administered, it will contribute to its added respect by the public and its efficiency in meeting the broad purposes of its establishment.